

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

LEONARD RAPHAEL HAWLEY,

Defendant and Appellant.

A124719

**(San Mateo County
Super. Ct. No. SC066899)**

Leonard Raphael Hawley (appellant) appeals the five-year prison sentence imposed after a jury found him guilty of assault with a firearm and with personal use of a firearm (Pen. Code, §§ 245, subd. (a)(2); 12022.5, subd. (a));¹ carrying a loaded firearm on his person or vehicle in a public place (§ 12031, subd. (a)(1)); and misdemeanor carrying a concealed weapon in a vehicle (§ 12025, subd. (a)(1)).² The court imposed the lower two-year term on the assault with a firearm (§ 245, subd. (a)(2)) count and imposed a consecutive three-year lower term for the firearm use enhancement (§ 12022.5, subd. (a)(1)) on that count. It also imposed a concurrent 16-month term on the carrying a loaded firearm (§ 12031, subd. (a)) count and stayed execution of that term. Appellant contends the court erred in denying his request for probation. We disagree and affirm.

¹ All undesignated section references are to the Penal Code.

² The jury acquitted appellant of negligently discharging a firearm and the court granted his section 995 motion to dismiss a criminal threats charge (§ 422).

BACKGROUND

In August 2008, appellant and Duane Pearson worked together and socialized outside of work. They both were interested in music and “DJing” and did various DJing jobs together. On August 2, they had a “gig,” arranged by appellant. In the early morning of August 3, at the end of the gig, appellant gave Pearson a ride home. During the drive, Pearson was upset and annoyed at appellant because appellant had interrupted Pearson’s set. They discussed no longer working together. Although appellant had agreed to stop at an “ATM” so that he could repay Pearson the \$40 Pearson had loaned him, appellant said he would not do so. They argued about appellant’s refusal to stop at the ATM.

When they arrived at Pearson’s house, they both got out of appellant’s car. Appellant grabbed Pearson’s “CD” pouch, which contained 300 CD’s, from inside the car and threw it on the street. To retaliate, Pearson grabbed appellant’s console stand, intending to throw it on the ground. Accidentally, this caused appellant’s expensive speaker to fall on the ground. Appellant became really angry, retrieved a semiautomatic gun from inside the car, pointed it at Pearson and said, “I’m not playing, I’m going to do this.” While still pointing the gun at Pearson, appellant then grabbed him by the collar and said, “I’m not playing. I will take you out.” Pearson repeatedly told appellant to “do it.” Appellant released Pearson after the gun jammed. Appellant then fired while holding the gun straight down. He again pointed the gun at Pearson but did not pull the trigger. Instead, appellant picked up his speaker, put it in the car and drove off. Pearson went inside his house and told his wife about the incident. Out of consideration for appellant, Pearson did not contact the police. However, at about 4:00 a.m., several neighbors heard the gunfire and called the police. The police responded, but left the scene after finding no evidence or suspect.

About 25 to 30 minutes after the incident, appellant called Pearson saying Pearson had wrecked his speaker and “it’s not over.” Later that afternoon, appellant again called Pearson and said that if Pearson did not pay for the speaker, appellant would come see him. Thereafter, Pearson agreed to allow his wife to call the police. When the police

arrived, Pearson's wife showed them the area where the incident occurred. The police recovered a live nine-millimeter bullet from the gutter in that area.

When appellant was arrested on August 4, 2008, he gave police a false San Francisco address. Thereafter, the police ascertained appellant's true address and, on August 5, executed a search warrant for that address. The search turned up a Ruger gun storage box and two boxes of nine-millimeter ammunition. No gun was recovered from appellant's residence or vehicle. However, the nine-millimeter bullet recovered from the shooting scene matched the bullets seized from appellant's residence.

On August 7, 2008, appellant filed a police report claiming that Pearson had assaulted him on the night of the charged incident. Appellant said his lawyer had advised him to file the report and appellant provided the police with no specific details regarding the incident.

The Defense

Testifying in his own defense, appellant conceded he borrowed \$40 from Pearson and said he intended to pay Pearson back. He denied telling Pearson he would stop at an ATM on the way home. Appellant said that after he and Pearson discussed not doing parties anymore, Pearson began demanding that appellant repay him the \$40. When they arrived at Pearson's house, Pearson refused to get out of appellant's car unless appellant gave him the \$40; appellant said he did not have it. Pearson also threatened to break appellant's equipment if appellant did not give him the \$40. When Pearson yanked a stand out of the car, one of appellant's speakers fell and broke. Appellant was angry and they struggled; Pearson struck him in the chest and arm with the stand. Pearson threatened to keep breaking appellant's things until appellant gave him the \$40. When appellant turned around to look at the speaker, he heard a gunshot. Appellant, who was unarmed, turned back around and saw Pearson holding a gun, still demanding his \$40. Appellant picked up his speaker, got into his car and drove off. Appellant said he called Pearson later that night and the next day to say Pearson owed him \$700 for the broken speaker.

DISCUSSION

Appellant contends the trial court failed to state sufficient reasons for denying his request for probation and the denial of probation was an abuse of discretion.³

The probation officer's report recommended that appellant's motion for probation be denied and appellant be committed to the California Department of Corrections and Rehabilitation. It also recommended that appellant serve 31 days in county jail with 31 days of credit for time served on the misdemeanor carrying a concealed weapon (§ 12025, subd. (a)(1)) count. The report noted that appellant had "stabilizing factors" including steady employment, family support, and a minimal prior record. However, it noted the seriousness of appellant's committing an unprovoked assault on the victim while armed with a gun. It also noted that since appellant had not given a statement, his level of remorse or acceptance of responsibility could not be ascertained. Citing California Rules of Court, rule 4.414,⁴ the report found that although appellant was a suitable candidate for supervised probation, the nature and seriousness of the offense and the vulnerability of the victim made the case unsuitable for probation. It noted appellant's threat of bodily harm to the victim was an aggravating factor (rule 4.421), and his lack of criminal convictions was a mitigating factor (rule 4.423).

At the outset of the sentencing hearing the court stated that it had considered the probation report, the parties' sentencing memoranda and the attachments thereto. In imposing its sentence it stated in relevant part: "At side-bar on Monday I had the -- after reflecting and thinking that the five year sentence for the facts in this case was pretty stiff; even though I could be imposing the low term for each aspect. So I suggested that, perhaps, consecutive sentences, keeping your client here, rather than state prison, might

³ Appellant argued below that pursuant to section 12022.5, the court could exercise its discretion to strike the gun use enhancement and, given his conduct, a five-year sentence was excessive. The People rejoined that the section 12022.5 enhancement is mandatory and cannot be stricken to impose probation. In his reply brief, appellant appears to acknowledge that this issue is abandoned on appeal.

⁴ All further rule references are to the California Rules of Court.

be an option; it turns out it is not. [¶] The probation and one year sentence in county jail, is not sufficient for this conduct. [¶] Therefore, I am going to impose the state prison terms as I believe are mandated for both the offense and the allegation. [¶] A couple of things. I am very mindful of the impact that [appellant's] conduct has thrust upon his family. I read that in the letter that I received, the passionate statements of the mother of his child, and his own mother. Notwithstanding that, [appellant's] conduct leaves me with very little choice. [¶] [Appellant's] story on the stand was rejected; not believable; and he has yet to acknowledge any complicity, and any remorse or apology for the . . . victim. And he has to keep in mind, as does his family and friends, that he brought this upon himself with this conduct. [¶] On a positive side, he is doing a wonderful job with his daughter. He is making every effort to overcome any disadvantages he may have had as a child; and that is commendable. [¶] Fourth, I would indicate that in the event the appellate court decided I was wrong in not striking the enhancement; I would be perfectly fine with that. It is regrettable that so much time has to be imposed. But the use of a gun; it is pretty clear that the Legislature and everyone in the state is very concerned about the guns. And it was [appellant] who possessed the gun and used it in this offense. [¶] So that's my reason."

For the first time on appeal, appellant argues that remand for resentencing is required because the trial court failed to state sufficient reasons for denying probation and imposing a state prison term, as required by rule 4.406(b)(2).⁵ (See *People v. Bowen* (1992) 11 Cal.App.4th 102, 105, fn. 1.) "Our Supreme Court has ruled that 'the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices,' including its failure to state reasons for those choices. [Citation.] Consequently, 'complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal.' [Citation.]" (*People v. Morales* (2008) 168 Cal.App.4th 1075, 1084.) Nothing in the transcript from the sentencing hearing

⁵ Appellant appears to have inadvertently cited the rule as rule 4.40(b)(2).

indicates that the court would not have heard an objection to the sufficiency of the reasons given for denying probation. Appellant's failure to object below waives the issue on appeal.

Appellant also argues the court abused its discretion in denying his request for probation because he "has a very minimal prior record consisting of two misdemeanors in 2001 that were dismissed in 2007. He was very involved in raising his four-year-old daughter with her mother and had an excellent employment history. He had overcome a very challenging background to become a productive citizen with no history of violence of any kind."

" 'All defendants are eligible for probation, in the discretion of the sentencing court [citation], unless a statute provides otherwise.' [Citation.]⁶ 'The grant or denial of probation is within the trial court's discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. [Citation.]' [Citation.] 'In reviewing [a trial court's determination whether to grant or deny probation,] it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances.' [Citation.] [¶] 'The decision to grant or deny probation requires consideration of all the facts and circumstances of the case. [Citation.]' [Citation.]" (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311 (*Weaver*).)

Rule 4.414 sets out the criteria affecting the trial court's decision to grant or deny probation, including facts relating to the crime and facts relating to the defendant. In addition, the trial court may consider additional criteria not listed in the rules provided those criteria are reasonably related to the decision. (Rule 4.408(a); *Weaver, supra*, 149 Cal.App.4th at p. 1313.) Unless the record affirmatively demonstrates otherwise, the trial court is deemed to have considered all relevant criteria in deciding whether to grant

⁶ Appellant is not statutorily ineligible for probation.

or deny probation or in making any other discretionary sentencing choice. (Rule 4.409; *Weaver*, at p. 1313.)

The court's decision to deny probation was made after it considered the probation report, the parties' sentencing briefs, and the testimony at the sentencing hearing. The court made it clear that despite any mitigating factors, its decision to deny probation was based on appellant's use of a firearm in committing the assault. "Whether the defendant was armed with or used a weapon" is one of the enumerated criterion affecting the decision to deny probation. (See rule 4.414(a)(2).) This factor was supported by substantial evidence. The court did not abuse its discretion in denying probation.

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.